Supreme Court, U. S.
FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

No. 77-572

In the Supreme Court of the United States

OCTOBER TERM, 1977

HAROLD JAMES JENKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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1. On September 9, 1974, petitioner was sentenced in the United States District Court for the Southern District of Ohio to six years' imprisonment, after a jury found him guilty of dealing in stolen firearms, in violation of 18 U.S.C. 922(j). The conviction was affirmed, but the case was remanded for resentencing. 513 F. 2d 633. This Court denied certiorari. 423 U.S. 1078. On February 9, 1976, the district court resentenced petitioner to five years' imprisonment, and on May 17, 1976, the district court suspended one year of that sentence.

On June 10, 1976, after petitioner had served three months of his sentence, the Board of Parole (now the Parole Commission) held a hearing and decided not to release petitioner. It explained that the expected confinement for his offense and offender characteristics was 26-32 months, and it set his case for a further hearing in December 1977.

On September 29, 1976, petitioner filed a motion in the sentencing court pursuant to 28 U.S.C. 2255. He asked the court to vacate his sentence, contending that the Board of Parole's use of release guidelines frustrated the intent of Congress and violated the Ex Post Facto Clause of the Constitution. The district court denied the motion without opinion.[1] The court of appeals vacated the denial and remanded with instructions to dismiss the motion for want of jurisdiction (Pet. App. 7-8). Relying on *Wright* v. *United States Board of Parole*, 557 F. 2d 74 (C.A. 6), it held that denials of parole may be challenged only in the district in which the prisoner is confined, not in the sentencing court under 28 U.S.C. 2255.

2. The nature of petitioner's complaint is not entirely clear. He seems to contend that the Parole Commission should have released him on parole, and he argues that his contention to this effect may be made in the sentencing court under 28 U.S.C. 2255. If this is the proper characterization of his argument, it presents a question that has created a conflict among the circuits concerning the proper disposition of at least some motions.

Five courts of appeals have held that prisoners' objections to parole decisions may be reviewed only in *habeas corpus* and that in such a proceeding a court may do no more than order the Parole Commission to make decisions in a way that is consistent with the Constitution. See *United States* v. *McBride*, 560 F. 2d 7 (C.A. 1); *Billiteri* v. *United States Board of Parole*, 541 F. 2d 938

[1]Petitioner filed a motion asking the district court to make findings of fact and conclusions of law, but the court did not rule on that motion.

(C.A. 2); *Wright* v. *United States Board of Parole, supra; Coil* v. *United States*, C.A. 7, Misc. No. 76-8086, unpublished order filed September 17, 1976, certiorari denied, 429 U.S. 1050; *Andrino* v. *United States Board of Parole*, 550 F. 2d 519 (C.A. 9).[2] Another court of appeals has indicated that it is inclined to follow these five courts if it should be squarely presented with the problem. *United States* v. *Kent*, 563 F. 2d 239 (C.A. 5).[3]

Two courts of appeals have held, however, that in some circumstances sentencing courts may reduce the sentences they had previously imposed in response to decisions by the Parole Commission. *Kortness* v. *United States*, 514 F. 2d 167 (C.A. 8); *United States* v. *Salerno*, 538 F. 2d 1005 (C.A. 3), rehearing *en banc* denied, 542 F. 2d 628. *Kortness*, as subsequently interpreted by the Eighth Circuit, allows review in the sentencing court if and only if (a) the defendant was sentenced prior to November 1973, when the Parole Commission adopted its sentencing guidelines; (b) the guidelines changed the "import" of the sentence; (c) the defendant was given a sentence under 18 U.S.C. (1970 ed.) 4208(a)(2), which allowed immediate eligibility for parole; and (d) the Parole Commission denied the defendant a prompt hearing at which he could attempt to persuade the Commission to grant parole. See *United States* v. *White*, 540 F. 2d 409 (C.A. 8); *Banks* v.

[2]The Court has denied review in two other cases in which courts of appeals so held. See *Persico* v. *United States*, certiorari denied, 429 U.S. 1091; *Mize* v. *United States District Court*, certiorari denied, October 31, 1977 (No. 77-5236).

[3]*Kent* held that parole decisions concerning sentences imposed after the Parole Commission's guidelines were promulgated in 1973 could be reviewed only by *habeas corpus*.

United States, 553 F. 2d 37 (C.A. 8); *Kills Crow* v. *United States,* 555 F. 2d 183 (C.A. 8).[4]

The state of the law in the Third Circuit is less clear. That court initially held in *Salerno* that it would follow the Eight Circuit's rule, and it later indicated that district courts would have jurisdiction under Section 2255 only with respect to sentences imposed prior to November 1973 under former Section 4208(a)(2). *United States* v. *Somers,* 552 F. 2d 108 (C.A. 3). That court's most recent case, however, held that Section 2255 provides jurisdiction to revise even sentences imposed under 18 U.S.C. (1970 ed.) 4208(a)(1) after the guidelines were promulgated, when the district judge misunderstood the consequences of the guidelines. *United States* v. *Solly,* 559 F. 2d 230 (C.A. 3). *Solly* did not discuss the apparent inconsistency with the Third Circuit's earlier decisions.[5]

We believe that the Third and Eighth Circuits are wrong. Section 2255 provides relief only when the sentence, or the proceedings leading to it, were defective, and the sentence is therefore infirm. *Davis* v. *United States,* 417 U.S. 333; *Affronti* v. *United States,* 350 U.S. 79, 83. The district court's power over the length of sentence expires 120 days after sentence has been imposed or the judgment has been upheld on appeal. Fed. R. Crim. P. 35. This time limit is jurisdictional and cannot be

[4]In no case subsequent to *Kortness* has the Eighth Circuit ordered or upheld Section 2255 relief on the grounds relied on in *Kortness.*

[5]Several other cases pending on appeal in the Third Circuit offer that court an opportunity to clarify its position. See, *e.g., Addonizio* v. *United States,* appeal pending, C.A. 3, application to reinstate release granted, 431 U.S. 909.

extended. Fed R. Crim. P. 45(b).[6] Persons desiring to attack the execution of their sentences are entitled to relief only in the district in which they are confined, as 28 U.S.C. 2241 provides.[7]

There is no need to resolve the conflict among the circuits in the present case, however, Petitioner was sentenced well after the promulgation of the parole guidelines, and his sentence was reduced twice thereafter.[8] He was given a "straight" sentence under 18 U.S.C. (1970 ed.) 4202, rather than one establishing early eligibility for parole under 18 U.S.C. (1970 ed.) 4208(a) (1) or (2). Petitioner has not alleged that the application of the Commission's guidelines frustrated the intent of the sentencing judge or otherwise changed the import of the sentence. He therefore would not be entitled to relief even under the Third Circuit's decision in *Solly,* which is the decision most favorable to him.

[6]See *United States* v. *Norton,* 539 F. 2d 1082 (C.A. 5), certiorari denied, 429 U.S. 1103; *United States* v. *Becker,* 536 F. 2d 471 (C.A. 1); *Thompson* v. *United States,* 536 F. 2d 459 (C.A. 1).

[7]See *United States* v. *DiRusso,* 548 F. 2d 372, 374-375 (C.A. 1):

> [T]he division of responsibility between the sentencing court and the Parole Commission would be skewed if a sentence could be vacated whenever the Parole Commission exercised its discretion so that a particular prisoner was to be confined for a substantially longer period than the sentencing judge had contemplated. * * *
>
> * * * To permit the district court to revise a sentence whenever the Parole Commission's decision was inconsistent with his intent would divest the Commission of its discretionary power under the law, and defeat the objectives of placing the parole decision in a separte body.

[8]Because petitioner was sentenced after the adoption of the guidelines, it is difficult to see how they could have an *ex post facto* effect in his case.

We doubt that a simple denial of parole, unless infected by reviewable procedural error, would ever entitle a prisoner to relief, unless parole were denied for constitutionally forbidden reasons, such as race or religion. But relief is available, if it is available at all, only on a petition for *habeas corpus* under 28 U.S.C. 2241.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.

DOJ-1977-12